

# CONSTRUCTION IN BRIEF

## BUILDING SUCCESS



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# What's New?



Christopher W. Sexton  
Co-Editor-in-Chief



Sydney Pierce  
Co-Editor-in-Chief

In the third and final issue of the strange year that has been 2020, our attorneys remind you about the importance of documenting issues encountered on the job, especially in the context of design-build contracts. You'll also learn about federal trademark protections from the Chair of our newest practice group focused on Trademark & Copyright Law. Lastly, we are proud to announce an important win for heavy highway electrical contractors in Pennsylvania whose sales and use tax obligations have changed favorably thanks to Kuharchik Construction and our team here at Cohen Seglias.

We wish you the best this holiday season, hope you and your families stay healthy, and look forward to a new year of *Construction in Brief* in 2021.

## CONTRIBUTORS:

Edward D. Altabet  
Roy S. Cohen  
Anthony H. Chwastyk  
Michael F. McKenna  
Timothy R. Ryan  
Stasha M. Sosnowicz

### Co-Editors-in-Chief:

Sydney Pierce  
Christopher W. Sexton

## Litigation Attorney Edward D. Altabet Joins Cohen Seglias to Serve as New York Office Managing Partner



We are pleased to announce that Edward Altabet has joined the firm as the New York office managing partner. Ed focuses his practice on commercial litigation and investigations. He previously served as founder and managing member of Altabet Law LLC.

**Ed** is a member of the firm's Commercial Litigation, International Investigations, and White Collar Defense & Government Investigations Groups. He litigates matters before state, federal, and appellate courts, focusing his practice on contracts, business torts, lenders' and creditors' rights, secured transactions, securities, partnership disputes, and executive employment issues. Ed also represents companies and senior executives, as well as religious and not-for-profit corporations, in connection with internal and regulatory-driven investigations relating to allegations of financial misconduct, undisclosed self-dealing, accounting fraud, improper allocation of restricted funds, and False Claims Act violations.

## Announcing Our Trademark & Copyright Law Group

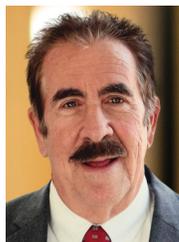
A company's brand and trademark distinguish it in a crowded marketplace and are among an organization's most important assets. Protecting trademarks is essential to ensure brand names, marks, domain names, and other brand identifiers maintain their value. Our new Trademark & Copyright Law Group, led by Anthony Chwastyk, helps clients navigate trademark registration, portfolio management, enforcement and licensing, and contract agreements.

Trademark registration affords companies federal protection from theft, infringement, and other misuses of trademarks. We help our clients determine what can and cannot be trademarked and then guide them through applying for and maintaining trademarks. Cohen Seglias attorneys protect clients' interests from the earliest stages of the process, including advising on initial searches of the Trademark Electronic Search System and vetting third-party vendors for a thorough review of social media, public records, and business directories. Our trademark experience enables us to ask clients the right questions as they proceed through the application process using the Trademark Electronic Application System and position them for approval from the U.S. Patent and Trademark Office.

## New Faces



**Anthony H. Chwastyk** joined our Philadelphia office as senior counsel. As trusted corporate counsel to companies in highly regulated and growing industries such as healthcare and e-commerce, Anthony helps clients navigate compliance and regulatory challenges so they can focus on innovating and expanding their businesses. His experience as corporate counsel to privately held organizations gives him a unique perspective when working with in-house attorneys and operational teams. In addition to his transactional work, Anthony chairs the Trademark & Copyright Law Group.



**David C. Petrone** joined the Philadelphia office as of counsel in Government Contracting Group. He helps government contractors analyze and mitigate risk throughout the course of a construction project. Dave counsels clients on preventative strategies to reduce the potential for disputes and conflicts, where the client is the ultimate decision maker on managing risks. Utilizing his experience as counsel to the Naval Facilities Engineering Command, he advises on issues including design build, environmental remediation, performance and payment bonds, the Federal Acquisition Regulation, procurement, and ethics.



**Alexandra M. Aversa** returns to Cohen Seglias as an associate in our Newark, NJ office. Alex supports construction industry clients, assisting owners, contractors, and subcontractors on both private and public projects. She conducts research and prepares pleadings and briefs in construction-related matters. While in law school, Alex was a summer associate in our Philadelphia office.



**Mehreen Imtiaz** is the newest member of our Washington, DC team. She helps individuals and companies navigate complex investigations and prosecutions brought by state attorneys general, the U.S. Department of Justice, and other federal and state agencies. Mehreen also conducts internal investigations on behalf of institutions regarding Title IX and research misconduct, and is a member of the firm's White Collar Defense & Government Investigations, Internal Investigations, and Scientific Misconduct Groups.



**Hope E. Kildea** joined our Labor & Employment Group as an associate in our Philadelphia office. She represents clients in a broad range of employment litigation matters, including discrimination, wage and hour, harassment, restrictive covenant, and other workplace disputes. Hope also advises clients on business disputes involving breach of contract, tortious interference, commercial collections, and partnerships, among others.

### Cohen Seglias Attorneys Named to 2021 Best Lawyers® List

Twelve Cohen Seglias attorneys are included in the 2021 edition of *The Best Lawyers in America*®, almost doubling the number of recognized attorneys from 2020. Lawyers are selected for inclusion based on an exhaustive peer-review process. In addition, a number of associates are included in the inaugural edition of the Best Lawyers: Ones to Watch, which recognizes extraordinary lawyers who have been in private practice for fewer than 10 years.

### Cohen Seglias Attorneys Named to 2021 Best Lawyers® List



**Roy S. Cohen**  
Litigation – Construction



**Edward Seglias**  
Construction Law, Litigation – Construction



**George E. Pallas**  
Construction Law, Litigation – Construction



**John A. Greenhall**  
Construction Law



**Marc Furman**  
Employment Law – Management, Labor Law – Management



**Jason A. Copley**  
Construction Law, Litigation – Construction



**Shawn R. Farrell**  
Litigation – Construction



**Lori Wisniewski Azzara**  
Litigation – Construction (new to the list)



**Jonathan A. Cass**  
Insurance Law (new to the list)



**Michael F. McKenna**  
Construction Law, Litigation – Construction (new to the list)



**Lisa M. Wampler**  
Litigation – Construction (new to the list)



**Steven M. Williams**  
Commercial Litigation (new to the list)

### Best Lawyers: Ones to Watch



**Jennifer R. Budd**  
Litigation – Construction



**Marc B. Cytryn**  
Labor and Employment Law – Management



**Kathleen Morley**  
Litigation – Construction



**Kelsey E. Riehle**  
Litigation – Construction

### Cohen Seglias Recognized by U.S. News – Best Lawyers® on the 2021 “Best Law Firms List”

We are pleased to announce that Cohen Seglias is named in the 2021 *U.S. News – Best Lawyers*® “Best Law Firms” list nationally for two practice areas and regionally in Philadelphia for four practice areas. The firm is listed in the following areas:



- **Construction Law**, National Tier 2
- **Litigation – Construction**, National Tier 2
- **Construction Law**, Philadelphia Tier 1
- **Litigation – Construction**, Philadelphia Tier 1
- **Labor Law – Management**, Philadelphia Tier 2
- **Employment Law – Management**, Philadelphia Tier 2

### Brionna L. Denby Listed on Delaware Business Times’ “Under 40” List



We are proud to announce that associate **Brionna Denby** is among this year’s “DBT40,” the *Delaware Business Times*’ list of 40 leaders and innovators in Delaware under the age of 40. Honorees were selected based on their professional achievements and contributions to their community.

Brionna is honored for her work as an attorney as she “strives to amplify the voices of people who have long been silenced.” Among the many volunteering efforts the publication highlights are her contributions around the clock helping people navigate difficult situations during the pandemic.

### Cohen Seglias Donates PPE to Local Hospitals

When the COVID-19 pandemic hit the United States in March, Cohen Seglias sought a way to support our local communities. Throughout the spring and summer, the firm donated over 1,000 face shields to the hospitals that were hit the hardest during the pandemic in Harrisburg, Newark, NJ, New York, Philadelphia, Pittsburgh, Washington, DC, and Wilmington. Each hospital received 200 face shields. These efforts were coordinated by the managing partners of each Cohen Seglias office.

Please consider giving back to hospitals as they continue to fight the pandemic and keep us safe.



For more information about Cohen Seglias news and events, contact the firm’s Marketing Director, Kerstin Isaacs, at 267.238.4730 or [kisaacs@cohenseglias.com](mailto:kisaacs@cohenseglias.com).

# Kuharchik: A Home Run for Heavy Highway Electrical Contractors' Tax Obligations



By Roy S. Cohen and Stasha M. Sosnowicz

This past summer, Cohen Seglias attorneys Roy Cohen, Ashling Ehrhardt, and Sydney Pierce obtained a victory for their client Kuharchik Construction against the Commonwealth of Pennsylvania in *Kuharchik Construction, Inc. v. Commonwealth*. In *Kuharchik*, the Commonwealth Court ruled in Kuharchik's favor on its appeal from the Pennsylvania Board of Finance and Revenue, finding that the poles, mast arms, and pedestals used in constructing traffic signals on roads and highways are included in the Pennsylvania Tax Reform Code's definition of "Building Machinery and Equipment" and are therefore **exempt** from Pennsylvania's use tax. This decision marks a major update for heavy highway electrical projects and subcontractors operating in Pennsylvania.

To put the *Kuharchik* decision in context, in the Pennsylvania Tax Reform Code, any contractor that works on a construction project for a tax-exempt entity, such as the Commonwealth or a municipality, is exempt from paying sales and use tax on building machinery and equipment used for the project. Use tax in Pennsylvania is a 6% tax on the use of tangible personal property purchased at retail, including supplies and materials used in construction projects, which ordinarily must be paid by the contractor unless sales tax was paid at the time of purchase or there is a tax exemption set out in Pennsylvania's Tax Reform Code. The Tax Reform Code generally provides for a "Building Machinery and Equipment" use tax exemption for contractors working on certain public or tax-exempt projects.

However, the exemption's definition of "Building Machinery and Equipment," as listed in Section 201(pp), is very delineated within the Tax Reform Code, and the few times the courts have examined it, they have further interpreted it narrowly. Basically, unless the Tax Reform Code's Section 201(pp) specifically lists out the piece of equipment that is exempt, construction contractors must pay use taxes on that item, even if working for a tax-exempt, public entity.

While much of this subsection is highly detailed, there are some areas that are ambiguous, specifically where traffic equipment is concerned. Section 201(pp) only mentions traffic equipment as a "control system limited to...traffic" and "traffic signals." "Traffic signals" itself is not defined within the Code. Any heavy highway electrical contractor knows that those terms are very broad and do not provide much in the way of guidance as to specific traffic signal equipment pieces which may or may not be taxed.

Kuharchik's dispute began when it was audited by the Pennsylvania Department of Revenue, which determined that Kuharchik owed use taxes for traffic control items it used for a public project, specifically traffic signal poles with mast arms and pedestal bases. Rather than accept the Commonwealth's position, Kuharchik spearheaded the effort to challenge that position, appealing the Department's audit all the way to the Commonwealth Court. Kuharchik argued that the broad inclusion of "traffic signals," the idea of the "traffic control system," and the lack of specific exclusions related to traffic signal-related equipment meant that the poles and mast arms that the Department sought to tax should actually be tax-exempt under the Building Machinery and Equipment definition. The Commonwealth Court agreed with Kuharchik, specifically ruling that common usage of the term "traffic signal" included the poles, mast arms, and pedestal bases because those items are required to support and integrate a traffic signal head for purposes of controlling traffic. The Court also ruled that any conduit, receptacle, or junction boxes are, however, subject to the tax because the Code's definition of Building Machinery and Equipment specifically excludes those items.

Following the decision, Robert Bresnahan, Jr., CEO of Kuharchik praised the team, stating that "Attorney Cohen and the entire team truly displayed the required expertise in navigating this controversial interpretation. This victory is monumental for our industry, municipalities, and tax payers that were never intended to be subjected to this hidden fee."

*Kuharchik* is a substantial win for heavy highway electrical contractors, as it specifically allows them to calculate more competitive bids for public projects knowing that they will not have to pay use tax on poles, mast arms, and pedestal bases for traffic signals, allowing for substantial savings. Moreover, for other contractors, the Court's ruling directly provided legal precedent regarding how other ambiguous, undefined terms listed within the Building Machinery and Equipment definition may be interpreted by Pennsylvania courts. While the Commonwealth is currently attempting to appeal the Court's decision, this glimpse into the decision-making process on this issue suggests that it may be an uphill battle for the Commonwealth. No matter what, the lawyers at Cohen Seglias will keep its clients and the public updated and are available for all your construction questions.

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*Roy* is a partner in the Construction Group and can be reached at 267.238.4701 and [rcohen@cohenseglias.com](mailto:rcohen@cohenseglias.com). *Stasha* is an associate in the Construction Group and can be reached at 267.238.4739 and [ssosnowicz@cohenseglias.com](mailto:ssosnowicz@cohenseglias.com).



# Protect that Brand: A Quick Guide to Filing Trademarks



By Anthony H. Chwastyk

A company's tradename and logo are valuable assets. Consumers' ability to associate a brand with a business' goods and services is a critical advantage against competition. Once a brand is designed and marketed—often at significant expense—many companies fail to take the next step to protect that investment: **getting a trademark**.

Federal trademark registration can confer numerous benefits, including:

1. Nationwide protection of your mark;
2. The right and ability to sue people who infringe on trademark rights in federal court with the possibility of triple damages and attorneys' fees;
3. A presumption of validity that would prevent infringers from claiming that they were allowed to copy or use a confusingly similar mark;
4. Advantages in disputing other people's use of the mark in domain names under the international Uniform Domain Name Dispute Resolution Policy; and
5. The opportunity to put the nation on notice of a mark's ownership through inclusion on the federal principal trademark register and the use of the ® symbol.

Using a brand in commerce can help enforce trademark rights against third parties who may wish to confuse or deceive customers.

So-called "common law" rights are helpful, but limited compared to federal registration because they are only enforceable in the region where a business operates. For those companies that are expanding the reach of a brand and operations, federal registration of the name and logo should be a key component of that growth strategy.

For all the benefits it provides, federal trademark registration is a relatively simple process. The first step is to clear the mark in question to ensure that no else has already secured trademark protection. This exercise starts with a "knock-out" search of Trademark Electronic Search System (TESS). If that search clears, a company should consult search engines and relevant Secretary of State business registries to find other parties utilizing a similar mark. For added peace of mind, best practices dictate retaining a third-party searching service to review public records, social media, and business directories. These vendors charge modest flat fees and have



a pretty impressive turnaround time. Once the uniqueness of the mark is established (i.e., that no other individuals or companies are using such a mark and that the company is the first to do so), a company should proceed to the application stage.

In preparing the trademark application, there are important decisions that must be made to ensure a mark receives the needed protection. Many critical pieces of information must be included in the application, such as the date the mark was first used, the industry it is used in, a description of the mark, and evidence of use. Trademark examiners will consider all of these factors when deciding on whether to approve an application. How the trademark and other information is presented in the application will have lasting implications on the protection the mark receives.

Once filed, the application is reviewed by a trademark examiner who reviews the application within the appropriate legal framework. If there is an application deficiency, they will issue an office action and request a response from the applicant. A company may either respond or let the application lapse, after which time the trademark office will ultimately accept or deny an application. An acceptance notice entitles a company to a fully protected federal mark, which will require some maintenance documents every few years to uphold.

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*Anthony is chair of our Trademark Law & Copyrights Group. If your company is interested in pursuing protection of your brand identity, please contact him at 267.238.4723 and [achwastyk@cohenseglias.com](mailto:achwastyk@cohenseglias.com).*

# The Name of the Game in Design-Build Contracts? Document, Document, Document!



By Michael F. McKenna and Timothy R. Ryan

Design-build contracts (and their lesser utilized counterpart—engineering, procurement, and construction (EPC) contracts) are prevalent in the construction industry. Though far from a new contractual relationship, design-build contracts are increasingly chosen by owners in an attempt to reduce risks and costs. The design-build model differs from the “traditional” design-bid-build model in that, with the traditional model, an owner is often very involved in both the initial design of the project and design decisions during the course of construction. An owner is given the opportunity during the design-bid-build process to tweak the design so that it truly becomes what they want. Design issues based on incorrect original assumptions can be worked out with revisions to the design prior to putting it out to bid. Further, in the traditional model, a design professional is generally retained by an owner and serves as the owner’s representative throughout the duration of a project.

In a design-build contract, on the other hand, the process is “streamlined.” At some point, the contractor becomes responsible for both the design and construction of a project. There is no doubt that the owner buys themselves a single point of contact. However, in exchange for that single point of contact and “fixed” price, the owner forgoes the ongoing customization options available in the traditional model. In design-build, once a project goes “hard dollar” (*i.e.*, the owner and the contractor come to a financial agreement), the owner is relegated to a far lesser role, limited to reviewing the contractor’s design documents to see if they meet the technical specifications prior to the start of construction. When the owner and contractor are on the same page with regards to obligations and expectations (and the contract is clearly drafted), the design-build model is a mutually beneficial endeavor. Unfortunately, oftentimes owners blur the lines by cherry-picking the most attractive aspects of each model: a single, guaranteed cost of

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When the owner and contractor are on the same page with regards to obligations and expectations (and the contract is clearly drafted), the design-build model is a mutually beneficial endeavor.

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construction (design-build) while simultaneously desiring to maintain a high level of involvement and implement mid-design/construct changes (traditional model). When an owner begins to blur the lines and overstep their authority, it is imperative for the contractor to document these oversteps because the owner’s actions may constitute a change in the design-build contract warranting additional compensation.

In the Armed Services Board of Contract Appeals (the Board) decision, *RBC Construction Corp.*, the owner of the project required the contractor to provide additional information concerning the proposed design of an underground fire cistern as part of the design review process. Within its contract, RBC Construction was permitted to proceed with construction only upon the owner’s approval of the initial “fast track” design submittals for each construction phase. The primary issue was that the underground fire cistern designs were not a required part of the “fast track” submittals, but instead in the later “interim design package.” Though the Board held that the owner’s actions were reasonable (in light of the risks associated with installing an underground cistern), it also held that the owner’s insistence on receiving the fire cistern design at an earlier point in time interfered with the contractor’s work. This was because, in the interim, while the owner was demanding the fire cistern designs, the owner’s designer would not approve the contractor’s “fast track” submittals. Thus, the contractor could not proceed with construction resulting in time impacts and related costs.

The Board’s holding in *RBC Construction Corp.* demonstrates why it is important to document project issues with written records. In this instance, the contractor found itself negatively impacted and losing both time and costs due to an overzealous owner. With its thorough and contemporaneous documentation, RBC Construction persuaded the Board that the owner’s active and excessive involvement constituted a constructive change to the contract.



When working on a design-build project, proper written and contemporaneous documentation is vital to ensuring the parties' contractual obligations are adhered to and that the owner does not overstep their authority and role. There is a surprisingly low number of court decisions addressing design-build contracts. As a result, as played out in *RBC Construction Corp.*, courts generally defer to the language of a contract and require the parties to abide by the contractual language. This puts contractors in a financially dangerous position when an owner starts unilaterally making design and/or construction changes while refusing to pay for those changes. These owners commonly point to the language whereby the cost of construction is "fixed," and the contractor is responsible for the changes. *RBC Construction Corp.* demonstrates this is simply not true. Once a contractor's design is approved and the project goes to "hard dollar," changes requested by the owner require compensation. *RBC Construction Corp.* also shows how important it is to document these change requests, as it is a contractor's burden to demonstrate how the requests changed the design-build contract and impacted time and money.

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*Mike is a partner in the Construction Group and can be reached at 973.313.8404 and mmckenna@cohenseglia.com. Tim is an associate in the Construction Group and can be reached at 973.313.8408 and tryan@cohenseglia.com.*

## Q&A with Edward D. Altabet



Our newsletter team recently sat down with the new managing partner of the firm's New York office, Ed Altabet.

**Q: Tell us a little about your practice and the services you provide your clients.**

**A:** I primarily represent clients in complex commercial litigation, internal and regulatory investigations, and corporate governance matters. I was trained as a litigator and trial lawyer out of law school but found that as I began to develop my own practice, I could provide real value to my clients through a more integrated approach to legal services. My practice focuses on helping clients successfully navigate business disputes, capture opportunities, and manage their legal and regulatory risk.

**Q: What types of clients do you represent?**

**A:** I represent a diverse group of clients across a range of industries, including large banks and smaller alternative lenders, mid-market companies in the import/export business, quick food service franchise businesses, and HVAC contractors, to name a few. Some clients are internet start-ups, and others are established churches and not-for-profits.

**Q: Why did you decide to join Cohen Seglias?**

**A:** The people and platform. As my practice grew, I wanted to join a firm committed to excellence, where the people were thoughtful and kind. My practice is concentrated in New York, New Jersey, and Pennsylvania, so I also wanted a firm that had deep roots in all three places to enable me to serve my clients more effectively.

**Q: What do you like most about your practice?**

**A:** Helping my clients. Law is a service business, and there is nothing more professionally gratifying and satisfying than when you can help a client solve a problem or realize an opportunity.

**Q: How did you get started in your career?**

**A:** I spent the first decade of my career as an associate at several top-tier AmLaw 100 law firms. It was an incredible education that served as a critical springboard to open my own practice and eventually join Cohen Seglias.

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*Ed is the managing partner of the New York office. He can be reached at 212.871.7019 or ealtabet@cohenseglia.com.*

# CAPABILITIES

At Cohen Seglias, we are committed to providing legal services of the highest professional standard and achieving the best results for clients. The firm and its attorneys are consistently recognized as top leaders in legal rankings such as *Chambers USA*, Best Lawyers, Super Lawyers, and Martindale-Hubbell.

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| Business Transactions                    | Green Building                                   |
| Commercial Litigation                    | Insurance Coverage & Risk Management             |
| Construction                             | Internal Investigations                          |
| Construction Contracts & Risk Management | Labor & Employment                               |
| Consumer Protection & Regulatory Defense | Non-Profit                                       |
| Crime Victims' Rights                    | Real Estate                                      |
| eDiscovery                               | Scientific Misconduct                            |
| Energy & Utilities                       | Student Defense                                  |
| False Claims Act & Whistleblowers        | Title IX   |
| Financial Services                       | Trademark & Copyright Law                        |
| Government Contracting                   | Wealth Preservation                              |
| Government Law & Regulatory Affairs      | White Collar Defense & Government Investigations |

# LOCATIONS

## HARRISBURG

240 North Third Street  
7th Floor  
Harrisburg, PA 17101  
717.234.5530

## NEWARK

One Newark Center  
1085 Raymond Boulevard  
21st Floor  
Newark, NJ 07102  
973.474.5003

## WASHINGTON, DC

900 Seventh Street, NW  
Suite 725  
Washington, DC 20001  
202.466.4110

## LOUISVILLE

500 West Jefferson Street  
Suite 2100  
Louisville, KY 40202  
502.205.9300

## PHILADELPHIA

30 South 17th Street  
19th Floor  
Philadelphia, PA 19103  
215.564.1700

## WILMINGTON

500 Delaware Avenue  
Suite 730  
Wilmington, DE 19801  
302.425.5089

## NEW YORK

55 Broadway  
Suite 901  
New York, NY 10006  
212.871.7400

## PITTSBURGH

525 William Penn Place  
Suite 3005  
Pittsburgh, PA 15219  
412.434.5530

# UPCOMING EVENTS

· DEC ·

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2020

## 🌐 WEBINAR

To Give or Not to Give: Considerations for Year-End Gifting

· DEC ·

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2020

## 🌐 WEBINAR

D.C. Bar Association CLE: Understanding the D.C. Criminal Justice System's Approach to Child Victims and Witnesses 2020

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2020

## 🌐 WEBINAR

The Impact of the 2020 Election on Labor & Employment Law

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2020

## 🌐 WEBINAR

CSI Akron-Canton Chapter: Managing Construction Risk Amidst Coronavirus – A Legal Perspective

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Be sure to visit our blogs for insights and information on current and emerging developments affecting the construction industry and federal construction contractors.

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